

In the Matter of:

Mynor Abdiel Tun-Cos, et al. vs. B. Perrotte, et al.

December 22, 2017



Court Reporting
Videography
Videoconferencing

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 Alexandria Division
4
5 -----:
6 MYNOR ABDIEL TUN-COS, et al., :
7 Plaintiffs, :
8 vs. : Case No.
9 B. PERROTTE, et al., : 1:17-cv-00943
10 Defendants. :
11 -----:

12 Alexandria, Virginia
13 Friday, December 22, 2017
14
15 The above-entitled matter came on to be
16 heard before the HONORABLE ANTHONY J. TRENGA, Judge in
17 and for the United States District Court for the
18 Eastern District of Virginia, Alexandria Division,
19 located at 401 Courthouse Square, Alexandria, Virginia,
20 commencing at 10:38 a.m., when were present on behalf
21 of the respective parties:
22

1 A P P E A R A N C E S

2

3 On behalf of Plaintiffs:

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22

1 A P P E A R A N C E S

2 (Continued)

3

4 On behalf of Defendants:

5 PAUL WERNER, ESQUIRE

6 Constitutional Torts Branch, Civil Division

7 U.S. Department of Justice

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9 Alexandria, Virginia 22314

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action Number

3 1:17-cv-943, Mynor Abdiel Tun-Cos, et al. versus B.

4 Perrotte, et al.

5 Will counsel please identify themselves for
6 the record.

7 MS. RYAN: Good morning, Judge. Hallie
8 Ryan with the Legal Aid Justice Center for the
9 plaintiffs. I'm here with my colleague, Simon
10 Sandoval-Moshenberg and Michelle Willauer in the
11 gallery with Covington and Burling.

12 THE COURT: All right. Welcome.

13 MS. RYAN: Thank you.

14 THE COURT: Good morning.

15 MR. BARGHAAN: Good morning, Your Honor.
16 Assistant United States attorney Dennis Barghaan on
17 behalf of the individual defendants. With me today
18 is Paul Werner from the Civil Division,
19 Constitutional and Specialized Tort Litigation staff,
20 and he will argue the cause on behalf of the
21 defendants today.

22 THE COURT: All right. We're here on

1 defendants' motion to strike seven additional
2 plaintiffs or alternatively to have those claims
3 severed. I have reviewed the briefing. I'd be
4 pleased to hear anything else you'd like to say that
5 you don't think you-all have already told the Court.

6 MR. WERNER: Thank you, Your Honor. May it
7 please the Court. My name is Paul Werner, as my
8 colleague mentioned, and I represent the five
9 individual defendants in this matter.

10 We have all of our arguments out on the
11 papers, Your Honor, but I'd just like to point out
12 that the concern here from the individual defendants
13 is based upon how the plaintiffs are trying to bring
14 all these claims together that involve two separate
15 incidents, two sets of plaintiffs, two sets of
16 defendants, two different dates --

17 THE COURT: But they have alleged
18 essentially -- I'm not sure if they used this term,
19 but essentially a pattern or practice that really
20 straddles both of these events, haven't they?

21 MR. WERNER: That's correct, Your Honor.
22 But these are individual capacity lawsuits against

1 individuals.

2 THE COURT: But just from a purely case
3 management perspective, doesn't it make sense to have
4 all these claims in one case -- all these plaintiffs
5 in one case? It would certainly facilitate more
6 efficient discovery I would think. It wouldn't
7 subject your clients to multiple depositions. And to
8 the extent that they need to be severed for the
9 purposes of trial, that's a decision the Court can
10 make down the road. Doesn't that all make sense?

11 MR. WERNER: We recognize that, Your Honor.
12 I guess the concern that we have is where is the
13 limiting principle here in terms of when do we say
14 that plaintiffs and defendants cannot be joined into
15 the same suit. And we have concerns about how long
16 this case could become in the event that additional
17 plaintiffs are added into this complaint.

18 THE COURT: All right. But you have here
19 incidents that were, what, a week apart?

20 MR. WERNER: Approximately nine days, Your
21 Honor.

22 THE COURT: And they've alleged similar

1 methodologies that were used, if you want to use that
2 term, in terms of what they're complaining about. So
3 there is some facial relatedness here. It's not as
4 if these two claims are completely -- are complete
5 strangers to each other.

6 MR. WERNER: That's correct, Your Honor00.
7 They do allege that the first -- I guess in time, the
8 first incident on February 8th was a ruse. There's
9 one plaintiff who alleges that. They don't allege
10 that for February 17th. So that would be a
11 difference.

12 And in terms of discovery, Your Honor,
13 there are different defendants, as we pointed out in
14 our briefs here, and there are many more individuals
15 on the February 8th incident who are alleged to have
16 been in that house. And so in terms of discovery,
17 there could be much more lengthy discovery going on
18 for the first incident than for the second incident,
19 which seems to be a more limited universe effect. So
20 in terms of discovery, it might be longer for those
21 defendants who had nothing to do with the February
22 8th incident who would have to be involved in that

1 discovery longer than they would otherwise have to,
2 but I understand Your Honor's point.

3 THE COURT: All right. Thank you.

4 MR. WERNER: Thank you, Your Honor.

5 THE COURT: Counsel.

6 MS. RYAN: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MS. RYAN: Just to address quickly
9 defendants -- some of the admissibility concerns, I
10 think Your Honor is right that there's substantial
11 overlap here. There is -- if the Court were to sever
12 the cases just from a common sense standpoint, Your
13 Honor is absolutely right that we do allege a series
14 of pattern of conduct on behalf of this team of ICE
15 agents.

16 Even if the cases were to be severed,
17 there's a good chance that at least some of the
18 evidence from either case would be admissible in
19 either trial. For instance, plaintiffs allege that
20 in the February 8th incident, one of the ICE agents
21 asked one of the plaintiffs if there were other
22 Spanish families living on that street. That's

1 certainly evidence that would go to motive of the
2 February 17th incident that's completely admissible
3 under 404(b). Other -- Modus operandi is another --
4 goes to identity also under 404(b). So just from a
5 common sense standpoint, there is substantial
6 overlap. The standard that defendants want to hold
7 plaintiffs to in this case is just simply not
8 supported by Rule 20.

9 We've alleged a series of transactions and
10 occurrences, the same setting. These incidents
11 happened before dawn nine days apart in neighborhoods
12 six miles away from each other. Both neighborhoods
13 were known to have high Latino populations, single
14 team of ICE agents. Both of the incidents involved
15 suspicionless (sic) stops based nothing more on race
16 or ethnicity. The only difference is that they
17 caught Mr. Tun-Cos after he had gotten into his car
18 as opposed to Mr. Valasquez Perdomo before he got
19 into his car. Both times they used a photo of a
20 supposed target of the enforcement action to either
21 instigate or prolong the stop. They demanded entry
22 in very similar ways to get into the plaintiffs'

1 homes. They required that each plaintiff produce
2 identification. And when that identification did not
3 affirmatively prove that they were in this country
4 with lawful immigration status, they arrested them
5 without any evidence going towards their immigration
6 status.

7 So these are truly, you know, pattern-type
8 behavior. The conduct was nearly identical in each
9 case. There's no question that there's, you know,
10 questions of law, in fact, common to these incidents,
11 and the case law really supports this sort of -- this
12 type of case moving forward. So we would just -- you
13 know, unless you have any other questions for us, we
14 would just urge the Court to deny their motion.

15 THE COURT: All right.

16 MS. RYAN: Thank you.

17 THE COURT: Counsel, I'll give you the last
18 word if you have anything else that you would like to
19 say.

20 MR. WERNER: Thank you, Your Honor. Just
21 on several points that plaintiffs' counsel made. In
22 terms of the admissibility of incidents that

1 happened -- of allegations of events that happened on
2 February 8th as to February 17th, that's exactly our
3 concern in terms of having individual defendants here
4 who may not have been involved in the February 8th
5 incident, having those sorts of incidents coloring
6 how a jury might view what they did on February 17th.
7 So that is really our strong concern of undue
8 prejudice to the individual defendants, seeing as
9 though they are being sued in their individual
10 capacities.

11 In terms of the case law, we cited numerous
12 cases to the Court involving individual capacity
13 claims where the courts did not permit -- it's just
14 one case. It's the Stojcevski case -- I believe
15 that's how it's pronounced -- where you had two
16 brothers who came into jail on the same day. Both
17 alleged that they received improper medical
18 treatment. And the court said we recognize that
19 they're bringing a policy and practice claim, but we
20 are going to sever these claims because otherwise all
21 the prisoners could sue together, and that's one of
22 our concerns here. Where is this limiting principle

1 -- why couldn't all sorts of plaintiffs come together
2 and sue a whole slew of ICE agents together in one
3 case, and we have concerns about that. Otherwise,
4 unless Your Honor has any further questions --

5 THE COURT: I don't. Thank you.

6 MR. WERNER: Thank you, Your Honor.

7 THE COURT: I've reviewed this matter which
8 is before the Court on defendants' motion to strike
9 the seven additional plaintiffs and their claims or
10 alternatively to sever those claims. As I indicated,
11 I think the most efficient way to go forward at this
12 point is to allow these additional plaintiffs to be
13 joined. And so for those reasons, I'm going to deny
14 the motion, but it's without prejudice to any
15 subsequent motions to sever and certainly without
16 prejudice to any evidentiary issues that may -- the
17 Court may need to deal with with respect to how the
18 case is tried. So the Court will issue an order.

19 MR. WERNER: Thank you, Your Honor.

20 MS. RYAN: Thank you, Your Honor.

21 THE COURT: Court will stand in recess.

22 (Whereupon, at 10:47 a.m., the

1 proceedings concluded.)

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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:
2 I, LAQUICIA THOMAS, Court Reporter and Notary
3 Public in and for the Commonwealth of Virginia at
4 Large, and whose commission expires February 28, 2018,
5 do certify that the foregoing is a true, correct, and
6 full transcript of the proceedings.

7 I further certify that I am neither related to
8 or associated with any counsel or party to the
9 proceedings; nor otherwise interested in the event
10 thereof.



11 _____
12
13
14 LaQuicia Thomas
15 Notary Public
16 Commonwealth of Virginia at Large
17 Notary No. 7363169

18

19

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21

22

WORD INDEX	Action 4:2 9:20 added 6:17 additional 5:1 6:16 12:9, 12 address 8:8 admissibility 8:9 10:22 admissible 8:18 9:2 affirmatively 10:3 agents 8:15, 20 9:14 12:2 Aid 2:6 4:8 al 1:6, 9 4:3, 4 Alexandria 1:3, 12, 18, 19 2:21 3:9 allegations 11:1 allege 7:7, 9 8:13, 19 alleged 5:17 6:22 7:15 9:9 11:17 alleges 7:9 allow 12:12 alternatively 5:2 12:10 ANTHONY 1:16 apart 6:19 9:11 Approximately 6:20 argue 4:20 arguments 5:10 arrested 10:4 asked 8:21 Assistant 2:18 4:16 associated 14:8 Attorney 2:18 4:16 Attorney's 2:19 Avenue 2:20 3:8	behalf 1:20 2:3, 16 3:4 4:17, 20 8:14 behavior 10:8 believe 11:14 Branch 3:6 briefing 5:3 briefs 7:14 bring 5:13 bringing 11:19 brothers 11:16 Burling 2:11 4:11 < C > capacities 11:10 capacity 5:22 11:12 car 9:17, 19 CARL 2:17 Case 1:8 6:2, 4, 5, 16 8:18 9:7 10:9, 11, 12 11:11, 14, 14 12:3, 18 cases 8:12, 16 11:12 caught 9:17 cause 4:20 Center 2:6, 12 4:8 certainly 6:5 9:1 12:15 certify 14:5, 7 chance 8:17 Church 2:8 cited 11:11 City 2:12 Civil 3:6 4:2, 18 claim 11:19 claims 5:2, 14 6:4 7:4 11:13, 20 12:9, 10 CLERK 4:2 clients 6:7 colleague 4:9 5:8 coloring 11:5	come 12:1 commencing 1:20 commission 14:4 common 8:12 9:5 10:10 COMMONWEAL TH 14:1, 3, 16 complaining 7:2 complaint 6:17 complete 7:4 completely 7:4 9:2 concern 5:12 6:12 11:3, 7 concerns 6:15 8:9 11:22 12:3 concluded 13:1 conduct 8:14 10:8 Constitutional 3:6 4:19 Continued 3:2 correct 5:21 7:6 14:5 counsel 4:5 8:5 10:17, 21 14:8 country 10:3 COURT 1:1, 17 4:12, 14, 22 5:5, 7, 17 6:2, 9, 18, 22 8:3, 5, 7, 11 10:14, 15, 17 11:12, 18 12:5, 7, 8, 17, 18, 21, 21 14:2 Courthouse 1:19 courts 11:13 Covington 2:11 4:11 < D > D.C. 2:14 dates 5:16 dawn 9:11 day 11:16 days 6:20 9:11
< 1 >			
1:17-cv-00943 1:9			
1:17-cv-943 4:3			
10:38 1:20			
10:47 12:22			
17th 7:10 9:2			
11:2, 6			
< 2 >			
20 9:8			
20001 2:14			
2017 1:13			
2018 14:4			
2100 2:20 3:8			
22 1:13			
22041 2:8			
22314 2:21 3:9			
28 14:4			
< 4 >			
401 1:19			
404 9:3, 4			
< 5 >			
520 2:7			
< 6 >			
6066 2:7			
< 7 >			
7363169 14:17			
< 8 >			
850 2:13			
8th 7:8, 15, 22			
8:20 11:2, 4			
< A >			
a.m 1:20 12:22			
ABDIEL 1:6 4:3			
above-entitled 1:15			
absolutely 8:13			

deal 12:17	expires 14:4	10:20 12:4, 6, 19, 20	joined 6:14 12:13
December 1:13	extent 6:8	Honor00 7:6	JR 2:17
decision 6:9	< F >	HONORABLE	Judge 1:16 4:7
Defendants 1:10	facial 7:3	1:16	jury 11:6
2:16 3:4 4:17, 21	facilitate 6:5	Honor's 8:2	Justice 2:6 3:7
5:1, 9, 12, 16 6:14	fact 10:10	house 7:16	4:8
7:13, 21 8:9 9:6	Falls 2:8	< I >	< K >
11:3, 8 12:8	families 8:22	ICE 8:14, 20	know 10:7, 9, 13
demanded 9:21	February 7:8, 10,	9:14 12:2	known 9:13
DENNIS 2:17	15, 21 8:20 9:2	identical 10:8	< L >
4:16	11:2, 2, 4, 6 14:4	identification 10:2,	LAQUICIA 14:2,
deny 10:14 12:13	first 7:7, 8, 18	2	14
Department 3:7	five 5:8	identify 4:5	LARGE 14:1, 4,
depositions 6:7	foregoing 14:5	identity 9:4	16
difference 7:11	forward 10:12	immigration 10:4,	Latino 9:13
9:16	12:11	5	law 10:10, 11
different 5:16	Friday 1:13	improper 11:17	11:11
7:13	full 14:6	incident 7:8, 15,	lawful 10:4
discovery 6:6	further 12:4 14:7	18, 18, 22 8:20	lawsuits 5:22
7:12, 16, 17, 20 8:1	< G >	9:2 11:5	Leesburg 2:7
DISTRICT 1:1, 2,	gallery 4:11	incidents 5:15	Legal 2:6 4:8
17, 18	give 10:17	6:19 9:10, 14	lengthy 7:17
Division 1:3, 18	go 9:1 12:11	10:10, 22 11:5	limited 7:19
3:6 4:18	goes 9:4	indicated 12:10	limiting 6:13
< E >	going 7:17 10:5	individual 4:17	11:22
EASTERN 1:2, 18	11:20 12:13	5:9, 12, 22 11:3, 8,	Litigation 4:19
effect 7:19	Good 4:7, 14, 15	9, 12	living 8:22
efficient 6:6 12:11	8:6, 7, 17	individuals 6:1	LLP 2:11
either 8:18, 19	gotten 9:17	7:14	located 1:19
9:20	guess 6:12 7:7	instance 8:19	long 6:15
enforcement 9:20	< H >	instigate 9:21	longer 7:20 8:1
entry 9:21	HALLIE 2:4 4:7	interested 14:9	< M >
ESQUIRE 2:4, 5,	happened 9:11	involve 5:14	management 6:3
10, 17 3:5	11:1, 1	involved 7:22	matter 1:15 5:9
essentially 5:18, 19	hear 5:4	9:14 11:4	12:7
et 1:6, 9 4:3, 4	heard 1:16	involving 11:12	medical 11:17
ethnicity 9:16	high 9:13	issue 12:18	mentioned 5:8
event 6:16 14:9	hold 9:6	issues 12:16	methodologies 7:1
events 5:20 11:1	homes 10:1	< J >	MICHELLE 2:10
evidence 8:18 9:1	Honor 4:15 5:6,	jail 11:16	4:10
10:5	11, 21 6:11, 21	Jamieson 2:20 3:8	miles 9:12
evidentiary 12:16	7:12 8:4, 6, 10, 13		Modus 9:3
exactly 11:2			

morning 4:7, 14, 15 8:6, 7	perspective 6:3	11:7	similar 6:22 9:22
motion 5:1 10:14 12:8, 14	photo 9:19	reasons 12:13	SIMON 2:5 4:9
motions 12:15	Pike 2:7	received 11:17	simply 9:7
motive 9:1	plaintiff 7:9 10:1	recess 12:21	single 9:13
moving 10:12	Plaintiffs 1:7 2:3	recognize 6:11 11:18	six 9:12
multiple 6:7	4:9 5:2, 13, 15 6:4, 14, 17 8:19, 21 9:7, 22 10:21	related 14:7	slew 12:2
MYNOR 1:6 4:3	12:1, 9, 12	relatedness 7:3	sort 10:11
< N >	please 4:5 5:7	Reporter 14:2	sorts 11:5 12:1
name 5:7	pleased 5:4	represent 5:8	Spanish 8:22
nearly 10:8	point 5:11 8:2 12:12	required 10:1	Specialized 4:19
need 6:8 12:17	pointed 7:13	respect 12:17	Square 1:19
neighborhoods 9:11, 12	points 10:21	respective 1:21	staff 4:19
neither 14:7	policy 11:19	reviewed 5:3 12:7	stand 12:21
nine 6:20 9:11	populations 9:13	right 4:12, 22 6:18 8:3, 10, 13 10:15	standard 9:6
NODGAARD 2:4	practice 5:19 11:19	road 6:10	standpoint 8:12 9:5
Northwest 2:13	prejudice 11:8 12:14, 16	Rule 9:8	STATES 1:1, 17 2:18, 19 4:16
Notary 14:2, 15, 17	present 1:20	ruse 7:8	status 10:4, 6
Number 4:2	principle 6:13 11:22	RYAN 2:4 4:7, 8, 13 8:6, 8 10:16 12:20	Stojcevski 11:14
numerous 11:11	prisoners 11:21	< S >	stop 9:21
< O >	proceedings 13:1 14:6, 9	Sandoval-Moshenb erg 4:10	stops 9:15
occurrences 9:10	produce 10:1	SANDOVAL-MOS	straddles 5:20
Office 2:19	prolong 9:21	HENBURG 2:5	strangers 7:5
operandi 9:3	pronounced 11:15	second 7:18	Street 2:13 8:22
opposed 9:18	prove 10:3	seeing 11:8	strike 5:1 12:8
order 12:18	Public 14:3, 15	sense 6:3, 10 8:12 9:5	strong 11:7
overlap 8:11 9:6	purely 6:2	separate 5:14	subject 6:7
< P >	purposes 6:9	series 8:13 9:9	subsequent 12:15
papers 5:11	< Q >	sets 5:15, 15	substantial 8:10 9:5
parties 1:21	question 10:9	setting 9:10	sue 11:21 12:2
party 14:8	questions 10:10, 13 12:4	seven 5:1 12:9	sued 11:9
pattern 5:19 8:14	quickly 8:8	sever 8:11 11:20 12:10, 15	suit 6:15
pattern-type 10:7	< R >	severed 5:3 6:8 8:16	Suite 2:7
PAUL 3:5 4:18 5:7	race 9:15	sic 9:15	supported 9:8
Perdomo 9:18	really 5:19 10:11		supports 10:11
permit 11:13			supposed 9:20
PERROTTE 1:9 4:4			sure 5:18
			suspicionless 9:15
			< T >
			target 9:20
			team 8:14 9:14

Tenth 2:13 term 5:18 7:2 terms 6:13 7:2, <i>12, 16, 20</i> 10:22 <i>11:3, 11</i> Thank 4:13 5:6 <i>8:3, 4</i> 10:16, 20 <i>12:5, 6, 19, 20</i> thereof 14:10 think 5:5 6:6 <i>8:10</i> 12:11 THOMAS 14:2, 14 time 7:7 times 9:19 today 4:17, 21 told 5:5 Tort 4:19 Torts 3:6 transactions 9:9 transcript 14:6 treatment 11:18 TRENGA 1:16 trial 6:9 8:19 tried 12:18 true 14:5 truly 10:7 trying 5:13 TUN-COS 1:6 <i>4:3</i> 9:17 two 5:14, 15, 15, <i>16</i> 7:4 11:15 type 10:12 < U > U.S 3:7 understand 8:2 undue 11:7 UNITED 1:1, 17 <i>2:18, 19</i> 4:16 universe 7:19 urge 10:14 use 7:1 < V >	Valasquez 9:18 versus 4:3 view 11:6 VIRGINIA 1:2, <i>12, 18, 19</i> 2:8, 21 <i>3:9</i> 14:1, 3, 16 vs 1:8 < W > want 7:1 9:6 Washington 2:14 way 12:11 ways 9:22 week 6:19 Welcome 4:12 We're 4:22 WERNER 3:5 <i>4:18</i> 5:6, 7, 21 <i>6:11, 20</i> 7:6 8:4 <i>10:20</i> 12:6, 19 We've 9:9 WILLAUER 2:10 <i>4:10</i> wit 14:1 word 10:18 < Y > you-all 5:5	
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